

# International Criminal Law

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In 2006, globalization, free trade, and technological developments raised significant challenges to the international criminal justice regime. This update reviews developments in three main areas in which states and international organizations must cooperate despite differing laws, enforcement priorities, and cultures: the International Criminal Court; cyber-crime; and online gambling. While there have been successes on some fronts, the developments in these areas show that success is not universal, and many issues remain unresolved.

## I. The International Criminal Court: A Court Progressing Toward Universal Jurisdiction

The year 2006 marked completion of the International Criminal Court's (ICC) first triennium and the conclusion of the first terms of office for its judges. The Rome Statute will enter into force for Chad on January 1, 2007, at which point the number of States Parties will total 104.<sup>1</sup> During 2006 the Court adopted a preliminary version of its Strategic Plan<sup>2</sup> and all organs of the Court—the Office of the Prosecutor, the Judicial Divisions,

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1. Of the States Parties, twenty-nine are African States, twelve are Asian States, fifteen are from Eastern Europe, twenty-two are from Latin America and the Caribbean, and twenty-six are from Western Europe and other States. The States Parties to the Rome Statute, <http://www.icc-cpi.int/statesparties.html> (last visited Nov. 29, 2006).

2. As stated in the Strategic Plan, the mission of the Court is: As an independent judicial institution in the emerging international justice system, the International Criminal Court will: 1) fairly, effectively and impartially investigate, prosecute and conduct trials of the most serious crimes; 2) act transparently and efficiently; and 3) contribute to long-lasting respect for and the enforcement of international criminal justice, to the prevention of crime, and to the fight against impunity.

the Presidency, and the Registry—engaged in institution-building activities. In November 2006, out-going U.N. Secretary General Kofi Annan praised the work of the Court, stating that “[t]he Court has established itself as the centrepiece of a truly international system of criminal justice. And it has become both the embodiment of, and the driving force behind, a profound evolution of international norms and law.”<sup>3</sup>

The Court continues to be seized of situations in the Democratic Republic of the Congo, Uganda, and the Central African Republic (referred to the Court by the States Parties themselves), as well as the situation in Darfur, Sudan (referred to the Court by the United Nations). The Office of the Prosecutor dismissed situations under investigation relating to Venezuela<sup>4</sup> and Iraq. Five additional situations remain under analysis. A non-State Party, Cote d’Ivoire, lodged with the Court a declaration of acceptance of the Court’s jurisdiction for crimes committed on its territory since September 19, 2002.

#### A. SITUATION IN DEMOCRATIC REPUBLIC OF CONGO

On January 12, 2006 the Office of the Prosecutor submitted a sealed application for an arrest warrant against Thomas Lubanga Dyilo, a Congolese national and the alleged founder and leader of the Union des Patriotes Congolais (UPC) and its military wing, the Forces Patriotiques pour la Liberation du Congo (FPLC). Lubanga is charged with war crimes: as President of the UPC and as Commander-in-Chief of the FLPC, Lubanga allegedly had ultimate control over UPC and FLPC policies and practices of conscripting, enlisting and using children under the age of fifteen to participate actively in hostilities.<sup>5</sup> The Lubanga matter is the first time charges have been brought based solely on this type of crime.<sup>6</sup> On February 10, 2006, Pre-Trial Chamber I issued a sealed warrant of arrest against the accused, which was transmitted to the Democratic Republic of Congo (DRC). On March 17, 2006, Lubanga was surrendered to the ICC. The Office of the Prosecutor has opened a second investigation into the situation in the DRC and may consider additional charges against Lubanga after completion of the first trial against him.<sup>7</sup>

From January through August 2006, Pre-Trial Chamber I rendered decisions on a number of issues in the DRC matter, including the right of victims to participate in pre-trial

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ICC-ASP/5/15, Report on Activities of the Court (17 October 2006), ¶ 89, available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf).

3. Kofi Annan, Secretary-General of the United Nations, Secretary-General’s Message to the Fifth Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court (Nov. 23, 2006), (transcript available at <http://www.un.org/apps/sg/sgstats.asp?nid=2319>) [hereinafter Secretary-General’s Message].

4. ICC, *Report of the International Criminal Court*, ¶ 30, U.N. Doc. A/61/217 (Aug. 3, 2006), available at [http://www.icc-cpi.int/library/organs/presidency/ICC\\_Report-to-UN\\_2006\\_English.pdf](http://www.icc-cpi.int/library/organs/presidency/ICC_Report-to-UN_2006_English.pdf) [hereinafter ICC Report].

5. The Prosecutor v. Thomas Lubanga Dyilo, *Warrant of Arrest* (signed by Judge Claude Jorga) (Feb. 10, 2006), ICC-01/04-01/06, [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2\\_tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf).

6. Congo-Kinshasa: ICC Deputy Prosecutor, Fatou Bensouda—We Will Investigate Other People And Other Crimes in DR Congo, ALLAFRICA, <http://allafrica.com/stories/200611160006.html> (last visited Nov. 29, 2006).

7. Report on Activities of the Court, ¶ 32, ICC-ASP/5/15 (Oct. 17, 2006), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf); Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Opening Remarks at the Fifth Session of the Assembly of States Parties 2 (Nov. 23, 2006), (transcript available at [http://www.icc-cpi.int/library/organs/otp/LMO\\_20061123\\_en.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_20061123_en.pdf)).

proceedings, the protection of victims and witnesses, the system for disclosure of and redaction of material from the Office of the Prosecutor, and the grounds for leave to appeal decisions of the Pre-Trial Chambers.<sup>8</sup> In anticipation of the hearing to confirm the charges against Lubanga, the Office of the Prosecutor disclosed voluminous evidence to the defense. The hearing to confirm the charges against Lubanga began on November 9, 2006, and continued on November 28, 2006. The Lubanga case is the first time in international criminal law that victims have been able to participate in the proceedings.<sup>9</sup> If the charges are confirmed, the Presidency of the Court will constitute a Trial Chamber responsible for trial proceedings thereafter.<sup>10</sup>

## B. SITUATION IN UGANDA

On October 14, 2005, Pre-Trial Chamber II unsealed the Court's first warrants of arrest against members of Uganda's Lord's Resistance Army (LRA): Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. The LRA is an armed rebel group that claims to fight for the freedom of the Acholi people in Northern Uganda but which has, according to the Prosecutor, mainly attacked the Acholis who have been killed, abducted, enslaved, and raped for over nineteen years.<sup>11</sup> The accused have been charged with crimes against humanity and war crimes, including: murder, sexual enslavement, intentionally attacking civilians, pillaging, rape, cruel treatment of civilians, and the forced enlistment of child soldiers.<sup>12</sup> The Office of the Prosecutor has confirmed that accused Raska Lukwiya was killed on August 12, 2006, but the remaining accused are still at large. On June 1, 2006, at the request of the Prosecutor, the International Criminal Police Organization (Interpol) issued "Red Notices"<sup>13</sup> alerting its member countries of the arrest warrants.

8. Report on Activities of the Court, ¶¶ 10-11, ICC-ASP/5/15 (Oct. 17, 2006), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf).

9. Press Release, ICC, The Confirmation of Charges Hearing for Mr Lubanga Dyilo Starts in The Hague (Nov. 9, 2006), available at [http://www.icc-cpi.int/pressrelease\\_details&id=202&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=202&l=en.html).

10. The Pre-Trial Chamber can: 1) confirm the charges for which it has found sufficient evidence; 2) refuse to confirm charges for which it has not found sufficient evidence; 3) adjourn the hearing and request the Prosecutor to provide further evidence or conduct further investigations; or 4) adjourn the hearing and request the Prosecutor to amend a charge if the evidence appears to establish a different crime than the one charged. *Id.*

11. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement by the Chief Prosecutor on the Uganda Arrest Warrants I (Oct. 14, 2005) (transcript available at [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_20051014\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf)).

12. The situation in Uganda was referred to the Court on Dec. 16, 2003, by the Government of Uganda—the first state referral in the history of the Court. On July 28, 2004, the Office of the Prosecutor decided to open an investigation into the situation in Uganda; on May 6, 2005, the Office of the Prosecutor applied for warrants of arrest against the accused, which warrants were unsealed on October 14, 2005. See ICC OTP Press Conference: The Investigation in Northern Uganda, (Oct. 14, 2005) (transcript available at [http://www.icc-cpi.int/library/organs/otp/Uganda\\_PPpresentation.pdf](http://www.icc-cpi.int/library/organs/otp/Uganda_PPpresentation.pdf)).

13. The Interpol Red Notice system is part of its global network of law enforcement agencies, created to assist in tracing and arresting internationally wanted fugitives. The Red Notices, which include a request to arrest and detain named individuals if found, are transmitted to National Central Bureaus in 184 countries. Press Release, ICC, Interpol issues first ICC Red Notices (June 1, 2006), available at [http://www.icc-cpi.int/pressrelease\\_details&id=151.html](http://www.icc-cpi.int/pressrelease_details&id=151.html). The Court does not have its own police force and needs the assistance of others in, *inter alia*, arresting and surrendering persons and enforcing the sentences of the convicted. ICC,

## C. SITUATION IN DARFUR

On March 31, 2005, pursuant to its Chapter VII powers, the U.N. Security Council adopted Resolution 1593, referring the situation in Darfur since July 1, 2002, to the ICC.<sup>14</sup> The Office of the Prosecutor opened its investigation into Darfur on June 6, 2005, despite the difficulties presented by the on-going conflict there. Because security conditions to protect victims and witnesses have not been present, investigative activities have occurred elsewhere, including the neighboring country of Chad. By August 2006, the Office of the Prosecutor had conducted three visits to Khartoum and more than fifty missions to fifteen countries. In addition, close to 500 potential witnesses were screened, sixty-one formal witness statements taken, and more than 8800 documents reviewed. On November 23, 2006, the Prosecutor announced that the investigation was nearing completion.<sup>15</sup>

## D. SITUATION IN THE CENTRAL AFRICAN REPUBLIC

The Office of the Prosecutor has not made a decision about whether to open an investigation into the situation in the Central African Republic.<sup>16</sup>

## E. SITUATION IN VENEZUELA AND IRAQ

Regarding the situation in Venezuela, the Prosecutor concluded that, based upon available information, a reasonable basis did not exist for believing that crimes within the jurisdiction of the Court had occurred.<sup>17</sup> Regarding the situation in Iraq, the Prosecutor observed that the ICC has jurisdiction only with respect to the actions of nationals of States Parties and that, while a reasonable basis existed to believe that crimes within the jurisdiction of the Court had occurred,<sup>18</sup> the situations involved did not appear to meet

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*Report of the International Criminal Court* (Summary), U.N. Doc. A/61/217 (3 August 2006), [http://www.icc-cpi.int/library/organs/presidency/ICC\\_Report-to-UN\\_2006\\_English.pdf](http://www.icc-cpi.int/library/organs/presidency/ICC_Report-to-UN_2006_English.pdf) (Summary).

14. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). In October 2004 UN Secretary-General Kofi Annan established the International Commission of Inquiry on Darfur; in January 2005 the Commission reported to the UN that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur; the Commission recommended that the situation be referred to the ICC. Following the Security Council's March 2005 referral of the Darfur matter to the ICC, the Office of the Prosecutor in June 2005 concluded his preliminary investigation and opened an investigation. The Prosecutor of the ICC Opens Investigation in Darfur, <http://www.icc-cpi.int/press/pressreleases/107.html> (last visited Nov. 29, 2006).

15. Luis Moreno-Ocampo, Fifth Session of the Assembly of States Parties, *Opening Remarks* (23 November 2006), [http://www.icc-cpi.int/library/organs/otp/LMO\\_20061123\\_en.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_20061123_en.pdf), p. 3.

16. ICC-ASP/5/15, Report on Activities of the Court ¶ 15 (17 October 2006), [http://www.icc-cpi.int/library/asp/ICC-ASP-5-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf); Luis Moreno-Ocampo, Fifth Session of the Assembly of States Parties, *Opening Remarks* (23 November 2006), [http://www.icc-cpi.int/library/organs/otp/LMO\\_20061123\\_en.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_20061123_en.pdf), p. 5.

17. *Id.* ¶ 58.

18. Specifically, a "limited number of instances of willful killing and/or inhuman treatment." ICC-ASP/5/15, Report on Activities of the Court ¶ 58 (17 October 2006), [http://www.icc-cpi.int/library/asp/ICC-ASP-5-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf).

the gravity threshold<sup>19</sup> of the Statute. In addition, national proceedings had been instituted by the relevant States.<sup>20</sup>

#### F. COOPERATION WITH SPECIAL COURT FOR SIERRA LEONE

In June 2006, the ICC concluded an arrangement with the Special Court for Sierra Leone regarding the trial of Charles Taylor. Concerned about stability in the region, should Taylor be tried in Freetown, the accused has been transferred to a detention facility in The Hague and will be tried by judges of the Special Court at facilities provided by the ICC.<sup>21</sup>

#### G. THE JUDICIAL DIVISIONS

On January 26, 2006, six judges were elected by the Assembly to nine-year terms (five judges were already-serving judges). The Pre-Trial Chambers received filings regarding their respective situations, and on July 13, 2006, the Appeals Chamber issued its first decision on the merits, dismissing the Prosecutor's application for extraordinary review of a decision by Pre-Trial Chamber I.<sup>22</sup> The Court adopted the first version of its Strategic Plan, providing a common framework for the Court's activities for the next ten years.

#### H. THE REGISTRY

The Registry provides judicial and administrative support to all organs of the Court, with specific responsibilities in the areas of victims, witnesses, defense, and outreach. During 2006, the Regulations of the Registry<sup>23</sup> were finalized and approved. The Regulations address key issues, including proceedings before the Court, responsibilities of the Registrar relating to victims and witnesses, counsel issues, and legal assistance and detention matters.

19. Rome Statute, Art. 17, § 1(d), available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

20. ICC-ASP/5/15, Report on Activities of the Court ¶ 58 (17 October 2006), [http://www.icc-cpi.int/library/asp/ICC-ASP-5-15\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-15_English.pdf); Luis Moreno-Ocampo, Fifth Session of the Assembly of States Parties, *Opening Remarks* (23 November 2006), [http://www.icc-cpi.int/library/organs/otp/LMO\\_20061123\\_en.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_20061123_en.pdf), p. 5.

21. The Special Court for Sierra Leone to use ICC Facilities for Trial of Charles Taylor, <http://www.icc-cpi.int/press/pressreleases/153.html>. In addition to its activities relating to the situations detailed above, the Office of the Prosecutor in 2006 enacted a "Prosecutorial Strategy" to complement the Court's Strategic Plan mentioned at the outset of this analysis. The Office of the Prosecutor, Report on Prosecutorial Strategy (Sept. 14, 2006), [http://www.icc-cpi.int/library/organs/otp/OTP\\_Prosecutorial-Strategy-20060914\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf). The Prosecutorial Strategy lists five objectives, to include improving the quality of the prosecution (completing two trials), conducting four to six new investigations, gaining necessary forms of cooperation for all situations, improving the interaction with victims and witnesses, and maximizing the Office's contribution to the fight against impunity and the prevention of crimes. *Id.* at 3.

22. Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Judge Georgios M. Pikis, Presiding) (13 July 2006), No. ICC-01/04, [http://www.icc-cpi.int/library/cases/ICC-01-04-168\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-168_English.pdf).

23. Regulations of the Registry, ICC-BD/003-01-06-Rev.1, [http://www.icc-cpi.int/library/about/officialjournal/ICC-BD\\_03-01-06-Rev1\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-BD_03-01-06-Rev1_English.pdf).

## I. THE PRESIDENCY

Following the election of six judges in January by the Assembly, the judges re-elected Judge Philippe Kirsch and Judge Akua Kuenyehia as President and First Vice-President, respectively, and Judge Rene Blattmann as Second Vice-President. The Presidency continued to provide support to the work of the Chambers, approved the Regulations of the Registry, and traveled by invitation to countries around the world to provide information about the Court.

## J. CONCLUSION

At the end of its third year, the International Criminal Court is a fully-functioning institution.<sup>24</sup> The Office of the Prosecutor has launched investigations into situations referred to it and the Judicial Divisions have interpreted and applied the provisions of the Rome Statute for the first time. The Court and the United Nations have continued to build on the Negotiated Relationship Agreement<sup>25</sup> entered into between the two bodies, developing mutual cooperation between the two institutions. The Court also has engaged with States and other international organizations, including regional organizations, to facilitate the cooperation necessary to its successful operation. Challenges remain, but even after only three years, it is clear that the ICC is "becoming the centerpiece of an emerging system of international criminal justice"<sup>26</sup> made possible by the "strong commitment and unwavering support"<sup>27</sup> of each State Party to the Rome Statute. As former Secretary General Annan as observed, "With 104 ratifications, a clear majority of UN Member States are now State Parties to the Rome Statute, and the Court is moving closer to its ultimate goal of universal jurisdiction."<sup>28</sup>

## II. Cybercrime

### A. UNITED STATES RATIFIES COUNCIL OF EUROPE CYBERCRIME TREATY

On October 2, 2006, the Council of Europe (CoE) announced that the United States had completed ratification of the CoE Cybercrime Convention, which will enter into force in the United States on January 1, 2007. The United States is the sixteenth country to ratify the Convention.<sup>29</sup>

The Convention requires signatories to criminalize conduct defined as computer crime, adopt domestic procedural laws to investigate computer crime, and render international enforcement cooperation in combating acts of computer crime such as attacks on the confidentiality, integrity, and availability of computer data and systems; forgery and fraud;

24. See ICC Report, *supra* note 4.

25. Under Article 3 of the Negotiated Relationship Agreement, the UN and the ICC agreed to cooperate with each other on matters of, for example, reciprocal representation, the exchange of information, administrative cooperation, and financial matters. The Agreement is on-file with the author.

26. See ICC Report, *supra* note 4.

27. See Secretary-General's Message, *supra* note 3.

28. *Id.*

29. Arthur Rogers, U.S. Cybercrime Treaty Ratification Accepted; Microsoft Makes Donation, Daily Rep. For Exec., Oct. 5, 2006, at A23.

production, dissemination, and possession of child pornography; and intellectual property infringements such as wide-scale distribution of pirated copies of protected works.

The international enforcement significance arises out of the obligation of the signatories to criminalize substantive crimes and engage in broad international assistance. The latter will be important for those countries with which signatories have not already concluded treaties. In addition, many existing conventions may not cover modern high-tech offenses incorporated into the CoE instrument. Internet service providers and data holders will now be required to retain records and furnish data to law enforcement officials on request. Banks and other institutions holding information useful to criminal investigations may also have to respond to law enforcement requests.<sup>30</sup>

As business relies more on electronic commerce, communication, and data, the legal regimes governing their activities and information are undergoing a similar internationalization.<sup>31</sup> Enforcement law, however, has often struggled to keep pace with technological developments that can be exploited by criminals. The CoE Cybercrime Convention is one example of efforts by international organizations and governments to develop enforcement regimes that bridge the gap between technology and international enforcement cooperation. The developments also show new degrees of cooperation between the private sector, law enforcement, and international organizations. Finally, the CoE Convention is a good example of a recent trend in international enforcement law—efforts to help developing countries keep pace with international enforcement developments. In areas such as anti-money laundering, counter-terrorism financial enforcement, and intellectual property enforcement, developing countries sometimes struggle to change laws and retrain officials and private sector groups to implement the obligations contained in international conventions.

#### B. MICROSOFT DONATION ACCEPTED BY COUNCIL OF EUROPE

On October 3, 2006, the CoE announced receipt of a \$250,000 donation from Microsoft Corporation to help states implement the CoE Convention.<sup>32</sup> After some debate, the CoE decided that it could accept Microsoft's contribution. The Microsoft donation is the first private sector donation that the Council has accepted in its fifty-seven-year history.

At present, the CoE program budget is \$2.1 million over thirty months. The Microsoft contribution enables the CoE to undertake the Convention's implementation, especially in non-European countries that need to bring domestic legislation in line with the Convention.<sup>33</sup>

The interaction of criminal and trade law illustrates a point made by the late Professor Wolfgang Friedmann in the 1960s about the increasing interaction between sub-fields of international law, such as international criminal and international trade law or interna-

30. See, e.g., Jeffrey F. Pryce, *The Globalization of Electronic Evidence Gathering: U.S. Joins Council of Europe Convention on Cybercrime*, 5 PRIVACY & SECURITY L. 1450 (Oct. 16, 2006 BNA).

31. *Id.*

32. *Id.*

33. *Id.* More information about the Convention on Cybercrime is available at <http://www.coe.int>. More information about CoE activities concerning cybercrime is available at [http://www.coe.int/T/E/Legal\\_affairs/Legal\\_co-operation/Combating\\_economic\\_crime](http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Combating_economic_crime).

tional banking law.<sup>34</sup> As Friedmann predicted, entire new branches of international criminal law are emerging (for example, international white collar crime, which embraces cybercrime). Likewise, the effort to keep international law abreast with technological developments, and even to harness technological innovation to prevent, investigate, and prosecution transnational crime, show the dynamic, challenging nature of international criminal law. The new area of cybercrime, as Professor Friedmann presaged, is one of the areas that may be beyond the scope of classical international law.

### III. Recent Developments in the Regulation Of Online Gambling in the United States: The Unlawful Internet Gambling Enforcement Act

In recent years, online gambling has been a booming industry in the United States and across the globe. In 2005, there were an estimated 2,300 gambling websites, with approximately twelve million American gamblers wagering \$6 billion dollars online.<sup>35</sup> Many lawmakers in the United States have expressed a problem with this growing industry, citing concerns about underage gambling, addictive gambling, organized crime, fraud, and money laundering stemming from online gambling operations.

As a result of these concerns, on September 30, 2006, Congress passed the Safe Port Act, which included Title VIII—Unlawful Internet Gambling Enforcement, also known as the Unlawful Internet Gambling Enforcement Act.<sup>36</sup> On October 13, 2006, President Bush signed this Act into law.<sup>37</sup>

#### A. WHAT THE ACT DOES AND DOES NOT DO

The Act prohibits any person engaged in the business of betting or wagering from accepting credit cards, electronic fund transfers, checks, and other similar payment devices.<sup>38</sup> Under the Act, banks and other financial institutions will be required to prohibit any transfer of funds from the accounts of their U.S.-based customers to any website that is involved with illegal gambling.<sup>39</sup> The Federal Reserve Bank, the Treasury Secretary, and the Attorney General have a 270-day period from the date of the Act's enactment to design the policies and procedures that financial institutions will be required to implement to prevent the restricted transactions.<sup>40</sup>

The Act explicitly states that the legislation does not alter existing laws prohibiting, permitting, or regulating gambling.<sup>41</sup> The Act does mention certain activities that are expressly considered to be illegal forms of gambling (such as sports betting) and legal (such as fantasy sports).<sup>42</sup> The Act does not, however, clarify whether online casino games

34. See Wolfgang Friedmann, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964), at 67 et seq., 152 et seq. (for new areas covered by international law).

35. George F. Will, *Prohibition II: Good Grief*, NEWSWEEK, Oct. 23, 2006, at 78.

36. 31 U.S.C. § 5361, et seq.

37. Press Release, Office of the Press Secretary, President Bush Signs SAFE Port Act (Oct. 13, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061013-2.html>.

38. 31 U.S.C. § 5363.

39. *Id.* § 5364.

40. *Id.*

41. *Id.* § 5361.

42. *Id.* § 5362; see also 28 U.S.C. § 3702.



such as poker are illegal. The legislation only serves to enforce the prohibition of financial institutions from funding "unlawful Internet gambling," which refers only to bets or wagers that are unlawful under federal, state, or tribal laws.

## B. SPORTS BETTING

There has been much recent publicity surrounding the placing of sports bets through the use of the Internet. The CEO of BetOnSports.com, David Carruthers, a U.K. national, was arrested in the United States in July on charges of violations of the Wire Act,<sup>43</sup> the Travel Act,<sup>44</sup> the Illegal Gambling Business Act,<sup>45</sup> RICO,<sup>46</sup> tax evasion, and money laundering.<sup>47</sup>

Additionally, the Chairman of Sportingbet, Peter Dicks—another U.K. national—was arrested in New York in September for allegedly violating Louisiana state laws prohibiting online gambling.<sup>48</sup> These two cases highlight the perilous course faced by foreign nationals who allegedly run afoul of state and federal laws prohibiting online gambling.

## C. INTERNET POKER

It seems clear that, under federal law, online sports betting is illegal and that the U.S. government will enforce a ban on such gambling by charging and, occasionally, arresting executives of gambling operations that involve sports betting. There is not, however, quite the same degree of clarity in regard to the legality or illegality of online poker, which represents a substantial portion of the online gambling industry and is growing in popularity due to the recent poker boom.

Some, including the Department of Justice, hold the position that online gambling, including online poker, has always been illegal under the Wire Act, which prohibits gambling over the "wires."<sup>49</sup> In 2002, John G. Malcolm, a then-Deputy Assistant Attorney General, gave a speech in which he stated that the Wire Act makes it a crime to knowingly transmit bets on any sporting event or contest. Mr. Malcolm continued to say that "it is

43. 18 U.S.C. § 1084.

44. 18 U.S.C. § 1952.

45. 18 U.S.C. § 1955.

46. 18 U.S.C. § 1961, et seq.

47. Philip Robinson, Dominic Walsh & James Doran, *FBI and Tax Officials in BetOnSports Probe*, TIMES (LONDON), July 18, 2006, available at <http://www.timesonline.co.uk/article/0,,29390-2274802,00.html>. See also Heather Timmons, *Competitors Concerned After the Arrest of a Major Figure in Internet Gambling*, N.Y. TIMES, July 19, 2006, available at <http://www.nytimes.com/2006/07/19/business/worldbusiness/19gamble.html?ex=1310961600&en=3bfcd0bf622e0bf&ei=5090&partner=rssuserland&emc=rss>.

48. Simon Bowers & Andrew Clark, *Sportingbet Arrest Threatens Internet Gambling*, THE GUARDIAN, Sept. 9, 2006, available at <http://business.guardian.co.uk/story/0,,1868328,00.html>.

49. See John G. Malcom, Deputy Assistant Attorney General, Remarks at Special Briefing: Money Laundering and Payment Systems in Online Gambling Sponsored by World Online Gambling Law Report (Nov. 20, 2002) (transcript available at [http://www.usdoj.gov/criminal/cybercrime/JGM\\_Intgambling.htm](http://www.usdoj.gov/criminal/cybercrime/JGM_Intgambling.htm)) [hereinafter Malcom Remarks]; American Gaming Association, Fact Sheet, Internet Gambling, [http://www.american-gaming.org/Industry/factsheets/issues\\_detail.cfv?id=17](http://www.american-gaming.org/Industry/factsheets/issues_detail.cfv?id=17); H.R. 4777, *The "Internet Gambling Prohibition Act": Hearing Before the Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security*, (April 5, 2006) (statement of testimony of Bruce G. Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, U.S. Dept. of Justice), available at <http://www.gambling-law-us.com/Articles-Notes/DOJ-testimony-4477.htm>.

the Department of Justice's position that this prohibition applies to both sporting events and other forms of gambling."<sup>50</sup>

Others argue that the Wire Act does not apply to Internet poker, as it bans gambling on sporting events and contests, and Internet poker does not fall into those categories. One court, the United States Court of Appeals for the Fifth Circuit, has agreed. In *Thompson v. MasterCard International Inc.*,<sup>51</sup> the Fifth Circuit affirmed the district court's decision that the Wire Act could not be applied to Internet poker because the Wire Act only concerns gambling on sporting events or contests.

There are other federal statutes, such as the Travel Act and RICO, that conceivably have a bearing on the legality of Internet poker, and it should also be noted that several states have taken matters into their own hands by passing legislation specifically banning some form of online gambling, including, at least in some instances, online poker.<sup>52</sup>

#### D. RESPONSE OF THE ONLINE GAMBLING INDUSTRY

Many of the larger online poker websites have interpreted the new legislation as banning Internet poker and have reacted quickly to the signing of the Unlawful Internet Gambling Enforcement Act. For example, both PartyGaming and 888 Holdings have suspended real money gambling with players from the United States. PartyGaming and 888 Holdings are publicly traded on the London Stock Exchange, and shares fell 58 percent and 26 percent, respectively, in the days following the signing of the bill.

London analysts have estimated that in the month following the passage of the bill, approximately \$7.6 billion of market value of publicly traded online gambling stocks have been lost.<sup>53</sup> Other companies in the business of online gambling maintain that Internet poker has always been legal in the United States and that the new bill has done nothing to change that. PokerStars.com, which is privately held, has continued to permit U.S.-based players to play on its website for real money.

#### E. WHAT HAPPENS NEXT IN REGARD TO ONLINE POKER?

Despite the recent legislation, the online gambling industry seems to be in need of clarity regarding the legality of Internet poker. Ultimately, that clarity will likely come by way of the courts. As mentioned, one court has already ruled that, under the Wire Act, online poker is not illegal. It is only a matter of time before other courts are heard.

Moreover, as a practical matter, and separate from its legality, online poker is likely to be severely curtailed, if not eliminated, under the new legislation. As stated, the Attorney General, the Treasury Secretary, and the Federal Reserve Bank are in the midst of devising the process by which financial institutions must enforce the Unlawful Internet Gambling Enforcement Act. The institutions will likely be required under the new regulations to disallow all transactions related to online gambling websites, including poker websites.

50. See Malcom Remarks, *supra* note 48.

51. *Thompson v. MasterCard Int'l Inc.*, 313 F.3d 257 (5th Cir. 2002).

52. See Gambling-Law-US.com, State Gambling Law Summary, <http://www.gambling-law-us.com/State-Law-Summary/>.

53. Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. TIMES, Oct. 31, 2006, at C3.

Therefore, regardless of whether or not existing law prohibits online poker, if players are prevented from transferring money to the poker websites, they will not be able to play.

#### F. THE INTERNATIONAL RAMIFICATIONS

The international ramifications of the passage of the new U.S. legislation, as well as the apparently increased enforcement of existing federal and state laws pertaining to online gambling, remains to be seen. Because Mr. Carruthers and Mr. Dicks are U.K. nationals, their arrests caused more than a bit of consternation in the United Kingdom, as that country takes a far more lenient approach to online gambling than does the United States. In fact, the U.K. government is seeking to enlist international support for legalized and regulated online gambling and recently hosted a conference on the subject at which representatives from many countries, but not the United States, were in attendance.<sup>54</sup>

Moreover, the World Trade Organization (WTO) has also become involved in the issue, prompted, at least in part, by a complaint brought by the government of Antigua and Barbuda that U.S. restrictions on online gambling violate international trade rules. The WTO has established a panel to investigate.<sup>55</sup>

Where all of this will lead is, at this point, unclear. What is clear, however, is that foreign executives who own or run online gambling websites risk criminal charges and arrest if they enter the United States.

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54. Heather Timmons & Eric Pfanner, *U.K. Pushes Global Rules on Gambling*, INTERNATIONAL HERALD TRIBUNE, Nov. 2, 2006, at Finance 14.

55. *W.T.O. Panel Will Investigate U.S. Limits on Online Gambling*, N.Y. TIMES, July 20, 2006, at C7.

